IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JERSEY DENTAL LABORATORIES f/k/a Howard Hess Dental Laboratories Incorporated, and PHILIP GUTTIEREZ d/b/a Dentures Plus, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 01-267-SLR
DENTSPLY INTERNATIONAL, INC., et al.	)	
Defendants.	)	

MEMORANDUM ORDER

At Wilmington this 27th day of August, 2002, having reviewed plaintiffs' motion to reargue and to request leave to amend complaint (D.I. 170) and the responses thereto;

IT IS ORDERED that:

1. **Motion to Reargue.** Plaintiffs seek reconsideration of the court's decision to dismiss damages claims against defendant Dentsply International.[1] The court may reconsider a decision to "correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). "[A] judgment may be altered or amended if the party seeking reconsideration shows at least one of the

[1]Damages claims were dismissed by Memorandum Opinion (D.I. 166) and Order (D.I. 167) dated December 19, 2001.

following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." Max's Seafood Café v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999).

2. Plaintiffs argue the court did not fully consider their allegations of direct purchases from Dentsply in making its decision, thereby committing clear error.[2] However, the court expressly acknowledged these allegations and determined that they had been made and rejected in the course of previous, closely related litigation. (D.I. 166 at 166 at 2 n.3) Although plaintiffs have corrected the pleading deficiency noted in the court's Hess summary judgment opinion,[3] plaintiffs offer no new theories or factual allegations on which to base their direct purchaser claims. Accordingly, the court will "refrain from re-deciding issues that were resolved earlier in the [closely related] litigation." Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc., 123 F.3d 111, 116 (3d

[2]Plaintiffs also express concern that the court did not review all the relevant arguments and exhibits before making its decision. The court, however, fully considered all arguments and exhibits submitted by the parties, as is the court's practice in all issues submitted for decision.

[3]See D.I. 181 in Hess et al. v. Dentsply International, Civ. No. 99-255-SLR.

Cir. 1997); see also Casey v. Planned Parenthood, 14 F.3d 848, 856 n.11 (3d Cir. 1994) (finding the law of the case doctrine applies "to subsequent rulings by the same judge in the same case or a closely related one").

3. **Request for Leave to Amend Complaint.** "A party may amend the party's pleading once as a matter of course at anytime before a responsive pleading is served. . . ." Fed. R. Civ. P. 15(a). "Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party. . . ." Id. Where plaintiff files a motion for leave to amend the complaint, the court treats the case as one in which leave of the court is required, even if plaintiff could have amended the complaint as a matter of course.[4] Centifanti v. Nix, 865 F.2d 1422, 1431 (3d Cir. 1989). Though motions to amend are to be liberally granted, a district court "may properly deny leave to amend where the amendment would not withstand a motion to dismiss." Id.; see also Oran v. Stafford, 226 F.3d 275, 291 (3d Cir. 2000) (refusal to permit amendment is proper where amendment would cause undue delay or prejudice or where amendment would be futile).

[4]Plaintiffs assert that the effect of dismissal on a party's right to amend a pleading as a matter of course is an unresolved issue in the Third Circuit. (D.I. 188 at 1 n.2) Nevertheless, plaintiffs have requested leave to amend, so the court will decide the motion accordingly.

4. Plaintiffs seek leave to amend the complaint to allege that defendants have engaged in a retail price-fixing conspiracy, that intermediary dental dealers act only as agents for Dentsply, that plaintiffs have suffered lost profits from the unrealized sale of competitive teeth, and that the dental dealers will not sue Dentsply. (D.I. 170, Exs. A & B)

5. In its December 19, 2001 opinion, the court noted that the original complaint did not clearly allege a retail price-fixing conspiracy. (D.I. 166 at 21) Plaintiffs propose to amend the complaint to specifically allege such a scheme. (D.I. 170, Exs. A & B) While this amendment cures a pleading deficiency, it does not change the court's ultimate decision that a retail price-fixing conspiracy does not allow plaintiffs to escape the bar to indirect purchaser lawsuits, where the intermediate dealers are alleged to be coerced, not substantially equal, co-conspirators.[5] (D.I. 166 at 19-24)

6. Plaintiffs also propose to add specific allegations that the dental dealers act merely as Dentsply's agents in the sale of Dentsply's teeth, because Dentsply controls the retail

[5]Plaintiffs assert active involvement on the part of dental dealers in "policing" the price deviations that allegedly result in retail price-fixing, citing deposition testimony submitted in the Hess summary judgment proceedings. (D.I. 171 at 12 n.4) The court notes plaintiffs made the opposite contention in their Hess summary judgment brief, claiming the same deposition testimony showed that policing was "orchestrated by Dentsply, not the dealers." (See D.I. 152 at 5)

prices for teeth and fills some teeth orders directly through drop shipments and orders placed on the Dentsply Order Network. (D.I. 170, Exs. A & B at ¶¶ 56-60) While the court acknowledges that some courts have treated a principal-agent relationship as potentially falling within the "control" exception to Illinois Brick,[6] the Third Circuit has not yet extended the scope of the exception beyond parent-subsidiary relationships. Therefore, as in Hess, the court declines to expand the exception to cover the agency relationship alleged by plaintiffs here, where the dealers are not subsidiaries of Dentsply.

7. Plaintiffs also propose to allege that they have suffered injury in the form of lost profits from unrealized sales of other manufacturers' teeth. (D.I. 170, Exs. A & B at ¶ 86) Plaintiffs argue these lost profits result from a foreclosure, not an overcharge, thus taking these damages outside of Illinois Brick. (D.I. 171 at 11) The court considered this argument in deciding the motion to dismiss and decided that any harm suffered by plaintiffs as a result of lost profits remained indirect. (D.I. 166 at 23-24 n. 9) As discussed at length in its December 19, 2001 opinion, the court finds that plaintiffs, as indirect purchasers, do not fall within the group of "private attorneys general" meant to enforce the antitrust laws, because the

[6] See, e.g., In re Mercedes-Benz Anti-Trust Litig., 157 F. Supp. 2d 355, 366-67 (D.N.J. 2001).

intermediate dental dealers remain the party directly harmed by the alleged anticompetitive activities of Dentsply.[7]

8. Plaintiffs' proposed allegations that the dental dealers will not sue Dentsply are also futile because, so long as the dealers can sue (i.e., are not substantially equal co-conspirators),[8] the fact that they will not sue does not eliminate the Illinois Brick bar to indirect purchaser lawsuits. See Illinois Brick, 431 U.S. at 746 (finding that adhering to indirect purchaser rule best encourages vigorous private enforcement of the antitrust laws even though some direct purchasers "may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers").

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[7]See Illinois Brick v. Illinois, 431 U.S. 720, 746 (1977) ("the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws . . . is better served" by concentrating all overcharge damages recovery in the hands of the direct purchaser); Kansas v. Utilicorp United, Inc., 497 U.S. 199, 218 (1990) (expressing willingness to consider new exceptions to the indirect purchaser rule only when "the direct purchaser will bear no portion of the overcharge and **otherwise suffer no injury**") (emphasis added); Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 969 (3d Cir. 1983) (finding indirect purchasers' claims to lost profits implicated Illinois Brick concern about overly complex and speculative damage theories, and applying Illinois Brick to indirect purchasers where intermediate dealers had a potential claim against the manufacturer for lost profits, thus risking duplicative recovery because the dealers "would be claiming treble damages for injuries arising from the very same transactions").

[8]See Link v. Mercedes-Benz, Inc., 788 F.2d 918, 932 (3d Cir. 1986) (citing Perma-life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968)).

9. Based on the above discussion, the court declines to reconsider its order dismissing damages claims against Dentsply and finds the proposed amended complaint would not survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Accordingly, the court denies the motion to reargue and the request for leave to amend the complaint (D.I. 170).

Sue L. Robinson
United States District Judge